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NO. 80-5854

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

GARNETT WILLIAM CAPE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the Supreme Court of Georgia properly found that no limiting instructions were required to be given by the trial court during the punishment phase in regard to Ga. Code Ann. § 27-2534.1(b)(7).

2.

Whether the trial court properly charged the jury concerning mitigating circumstances during the punishment phase of Petitioner's trial.

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Garnett William Cape, was indicted in Franklin County, Georgia during the October Term, 1979, for the murder of Karen Dove. (R. 4, 5). Following a trial by jury, Petitioner was found guilty and the jury imposed the death penalty. The jury imposed the death penalty based on the existence of the seventh aggravating circumstance in the Georgia sentencing procedure, that is Ga. Code Ann. § 27-2534.1(b)(7).

The evidence at trial showed that the Petitioner, a fifty-six year old male, was the uncle of the victim's mother. He was also well acquainted with the victim's family. He had developed a close relationship with all members of the family, including the victim, a fifteen year old high school student.

Approximately three months prior to the murder, the victim's parents, James and Linda Dove, asked Petitioner not to come around their house or Karen any longer. They also asked their daughter to stay away from the Petitioner. Mrs. Dove testified at trial that Petitioner seemed "too interested" in Karen and was acting like a boyfriend toward her. Mr. Dove testified that Karen did not display the same attitude toward the Petitioner. (T. 478). Approximately two weeks prior to the murder, Petitioner was talking to the victim's brother about buying a car for her.

On May 12, 1979, Petitioner went to a car dealership and stated that he wanted to buy a car for his niece. He signed an order for a car costing over $8,000.00. The next day, Petitioner took the victim to the dealership to see the car. On Monday, he informed the dealership that his money was being wired from a bank in Texas and that he would pick up the car on Thursday.

On the morning of May 17, 1979, Petitioner took the victim and a friend of hers to school. Petitioner picked the victim up from school at 3:15 p.m. that day. At 4:45 p.m. Petitioner went to a hardware store where the victim's brother worked. Petitioner told Ronald Dove that he had taken Karen to get her birth certificate at the courthouse in Carnesville, Georgia, and that she never came back. The victim's brother noticed that Petitioner had cuts on his hand and scratches on his face at that time. Various other members of the community and the victim's family were told of the alleged disappearance of Karen Dove.

Around 6:30 p.m., the victim's brother and two friends went to the Petitioner's house. There was a note on the door stating that he had gone to Anderson. The three individuals unlocked the front door through a broken window pane. A chair had been propped up against the front door from inside. Clothes were scattered around the first bedroom in the house. A string of clothes was hanging across another door in the second bedroom. The three individuals saw the body of Karen Dove lying on a piece of black plastic on the floor. The black plastic covered the body of the victim to the waist.

After an autopsy was conducted, Dr. Dawson determined that there were multiple wounds on the head, including five lacerations scattered about the scalp, an incized wound in front of the left ear, contusions over both eyes, ears and sides of the head, multiple fractures to the skull and bruising on the tongue and lips. (T. 298, 299, 305). The victim also suffered five major stab wounds in the left side of the back and two stab wounds in the front chest. The stab wounds penetrated the pleural cavity, lungs and heart. Other wounds included an abrasion on the elbow, a contusion on the left shoulder, and two ecchymotic hemorrhages on the neck. The cause of death was most directly related to the loss of blood. An iron pipe found in the house fit some of the wounds and could have caused the blows to the head. Evidence indicated that injuries to the face and head occurred prior to the stab wounds and that the victim was probably alive at the time the wounds were inflicted.

Further tests conducted by the State Crime Lab weakly suggested the presence of seminal fluid on the oral swabs taken from the victim. Hair found on the end of the iron pipe was found to be similar to that of the victim.

The Petitioner testified in his own behalf and again asserted that the victim disappeared from the courthouse. Various witnesses testified in mitigation concerning Petitioner's character both at the guilt-innocence phase of the trial and the punishment phase.

The jury found the defendant guilty of murder. The jury also found that "the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind and/or aggravated battery to the victim". The jury imposed the death penalty based on this finding.

Appellant's Motion for New Trial was denied and a Notice of Appeal was filed with the Supreme Court of Georgia on March 25, 1980. After briefs were presented, and oral argument was conducted, the Supreme Court of Georgia affirmed Petitioner's conviction and sentence on October 8, 1980. Cape v. State, 246 Ga. 520, _S.E.2d_ (1980). Among other issues, the Supreme Court of Georgia considered the two issues raised by the instant petition. Petitioner now seeks review in this Court of his conviction and sentence.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT NO LIMITING CHARGE WAS REQUIRED DURING THE PUNISHMENT PHASE OF PETITIONER'S TRIAL IN REGARD TO THE AGGRAVATING CIRCUMSTANCE SET FORTH IN GA. CODE ANN. § 27-2534.1(b)(7).

After Petitioner's conviction, the trial court conducted a sentencing hearing during which various evidence was presented to the jury. The Court subsequently charged the jury that to impose the death penalty, they must find the existence of a statutory aggravating circumstance beyond a reasonable doubt. The only aggravating circumstance presented in the instant case was that set forth by Ga. Code Ann. § 27-2534.1(b)(7), that is, "The offense of murder was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim." This is also the manner in which the code section was charged to the jury. (T. 812). The Court charged the jury thoroughly on the form of its verdict and explained the effect of mitigating circumstances. No specific definitional instructions were given in regard to the seventh aggravating circumstance.

Petitioner asserts before this Court, as he did in a supplemental brief to the Supreme Court of Georgia, that the trial court should have been required to give a limiting charge on this aggravating circumstance. Petitioner relies on this Court's holding in Godfrey v. Georgia, 100 S.Ct. 1759 (1980), in which this Court considered the seventh aggravating circumstance.

Although this case was tried before this Court's decision in Godfrey supra, the decision of the Supreme Court of Georgia was not rendered until after the Godfrey decision. The Supreme Court considered the present allegation raised by the Petitioner and determined that under Georgia law, no such limiting instruction was required.

This Court's decision in Godfrey, supra, considered the question of the validity of a death sentence and whether, in light of the facts and circumstances of the murders in that case, the Supreme Court of Georgia applied a constitutional construction of Ga. Code Ann. § 27-2534.1(b)(7). Godfrey, supra, at 1762. The Court in Godfrey was faced with a different circumstance from the instant case. In Godfrey, the jury merely returned a finding that the offense of murder was outrageously or wantonly vile, horrible or inhuman. No finding was made referring to aggravated battery or torture. In the present case, the jury returned a finding of the entire aggravating circumstance including the provisions relating to torture or aggravated battery. The Supreme Court of Georgia found that there was sufficient evidence for the jury to find this aggravating circumstance beyond a reasonable doubt.

In Gregg v. Georgia, 428 U.S. 153 (1976), this Court upheld the constitutionality of the Georgia death penalty scheme, including the aggravating circumstance attacked in the instant case. Even in the decision in Godfrey, this Court continued to find the seventh aggravating circumstance constitutional on its face. In Godfrey, the question was addressed solely to the construction applied by the Supreme Court of Georgia.

Petitioner has asserted that there was no explanation given for any of the words used in the seventh aggravating circumstance. No such requirement was implemented by this Court in Godfrey nor has the Supreme Court of Georgia ever set forth such a requirement. The Supreme Court of Georgia thoroughly considered the seventh aggravating circumstance in its recent decision of Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980). In Hance, the Court noted that the phrases in the first portion of the statute, "outrageously or wantonly vile, horrible or inhuman" have a common meaning and are used to distinguish murders for which the death penalty is not appropriate. The Court also noted the plain meaning of the statute requires that the murder not only be outrageously or wantonly vile, horrible or inhuman, but also that there be an aggravated battery to the victim, torture of the victim or depravity of mind of the particular defendant. The Court then went on to explain the meaning of aggravated battery, torture and depravity of mind.[1]

As noted by the Supreme Court of Georgia in the instant case, Petitioner's case presents one clearly distinguishable from that of the case in Godfrey. The entire statutory aggravating circumstance was returned by the jury in the instant case, whereas, the jury in Godfrey only found that the murder was outrageously or wantonly vile, horrible or inhuman. In Godfrey, this Court found that there was nothing in the latter phrase to show any restraint in the infliction of the death penalty. The Supreme Court of Georgia went on to note that the second portion of the aggravating circumstance, that is, that portion requiring a finding of torture,

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1/ A petition for certiorari has been filed in this Court in Hance, supra, although the issue of the seventh aggravating circumstance was not presented to this Court.

aggravated battery, or depravity of mind, would be sufficient to support a finding of the death penalty if there was sufficient evidence to support the jury's finding beyond a reasonable doubt of one of those factors. In the instant case, the Court found that the jury's finding of the second clause of the statute was clearly supported by the evidence beyond a reasonable doubt and that there was no need to speculate as to the jury's interpretation of the statute in the instant case. Clearly, this case does not present one in which a limiting instruction would have been required. The review of the Supreme Court of Georgia on direct appeal clearly shows that the jury's finding was supported by the evidence and that the infliction of the death penalty was not arbitrary or capricious.

Petitioner cites several decisions from this Court in an attempt to have this Court once again consider the seventh aggravating circumstance. The instant case clearly does not present a situation like that presented to this Court in Stromberg v. California, 283 U.S. 359 (1931). In Stromberg, the jury had merely made a generalized finding and did not specify which portion of a statute it was relying on. The state court in Stromberg had even noted that a portion of the statute might be unconstitutional. In the instant case, the jury made a specific finding of the seventh aggravating circumstance. The mere fact that the second portion of that statutory provision is worded in the disjunctive, does not make the jury's finding a generalized one.

Petitioner also cites certain holdings by this Court in an argument that an appellate court cannot make belated findings of fact to support a jury's conclusion. This is clearly not what the Supreme Court did in the instant case. The Supreme Court of the State of Georgia is charged with review of the aggravating circumstances found by the jury. The Supreme Court of Georgia has a statutory duty to consider whether the evidence supports the jury's or judge's finding of the aggravating circumstance under Ga. Code Ann. § 27-2537(c)(2). The Court did not make belated factual findings, but merely considered the evidence as presented to the jury and determined that there was sufficient evidence to support its verdict. This is no different from a Court considering the sufficiency of the evidence to support a conviction on direct appeal.

Petitioner finally asserts that even after the elaborate review by the Supreme Court of Georgia, the Court's interpretation of the term "torture" is overly broad as applied to Petitioner's case. Respondent asserts that the word torture is one of common understanding by the general public and would not require a specific definition in a jury charge. Furthermore, the Supreme Court of Georgia determined in Hance, supra that torture would occur when a victim is subjected to serious physical abuse before death. Hance, supra, at 861. The Court also found that an aggravated battery could constitute torture to the victim as could serious sexual abuse. Clearly, these definitions of torture do not allow a Court to include any assault of lethal magnitude as asserted by the Petitioner.

In considering the specific facts of this case, Respondent asserts that this Court can clearly see that this does not present a simple case in which the victim did not die immediately. Had the fatal wound been the only one inflicted on the victim, then a finding of torture would be difficult to support. In the instant case however, there are numerous additional injuries that obviously occurred prior to death that do support a finding of torture. As noted by the Supreme Court of Georgia,

> "Under the evidence in this case, the victim was beaten with an iron pipe. She sustained multiple skull fractures and the force of the attack was so great that the skull was fractured almost in half. The victim sustained bruises on the left shoulder and neck probably as a result of being choked. The tongue and upper lip were bruised and part of the lower lip was swollen. After the victim sustained the head injuries, she was stabbed five times in the back and twice in the chest. Death ensued from the loss of blood.
>
> When the body was found, it was in a partial state of undress. One breast was exposed and the pants the victim was wearing were unzipped. Forensic evidence suggested the presence of seminal fluid in the oral cavity, but was not conclusive. However, the state of undress, bruising about the mouth, and the suggested presence of seminal fluid would authorize a finding of serious sexual abuse."

Cape, supra, 246 Ga. at 528. Thus, as noted by the Supreme Court of Georgia, there was sufficient evidence for the jury to find serious sexual abuse, thus constituting serious physical abuse or to merely make a finding of torture through the numerous and varied injuries inflicted to the victim prior to death. This is hardly a case to fall within the category of "ordinary murders".

Respondent asserts that, as found by the Supreme Court of Georgia, no limiting instruction was required to be given to the jury at trial. No such instruction was ever requested at trial, nor has this Court ever determined that such an instruction is an essential requirement. The statutory aggravating circumstance found by the jury was clearly supported by the evidence and the jury made a specific finding in the instant case of the seventh aggravating circumstance. The trial court instructed the jury as to the statutory provision and, thus, based on the common understanding of the terms in the statute, no further guidance was necessary.[2]

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2 Petitioner refers in his petition to this Court to certain recent cases considered by this Court. See Patrick v. Georgia, 49 U.S.L.W. 3371 (Nov. 18, 1980); Hardy v. Georgia, 49 U.S.L.W. 3371 (Nov. 18, 1980); Thomas v. Georgia, 49 U.S.L.W. 3371 (Nov. 18, 1980). Petitioner notes that the Supreme Court of Georgia relied upon Patrick and Thomas in its Appendix in support of Petitioner's death sentence and emphasizes the fact that this Court has recently remanded the cases. It should be noted that the cases in the Appendix in the decision by the Supreme Court of Georgia are considered to determine whether or not the sentence is successive or disproportionate to the penalty imposed in similar cases. The death sentences in the case cited by the Petitioner have not been vacated, but the judgment of the Supreme Court of Georgia has been vacated. Those cases, similar to cases decided by this Court in May, 1980, have been remanded for further consideration by the Supreme Court of Georgia in light of this Court's decision in Godfrey. This Court did not order that the sentences be vacated, but merely ordered that the Supreme Court of Georgia reconsider each case.

Respondent does submit that this allegation by the Petitioner does not present an issue for review by this Court.

B. THE TRIAL COURT PROPERLY CHARGED THE JURY DURING THE PUNISHMENT PHASE OF THE TRIAL AS TO MITIGATING CIRCUMSTANCES TO BE CONSIDERED BY THE JURY.

On direct appeal to the Supreme Court of Georgia, the Petitioner asserted that the trial court should have defined mitigating circumstances and specifically provided in written form the mitigating circumstances relied upon by the Petitioner. The Supreme Court of Georgia found that the jury was adequately instructed as to the meaning of mitigating circumstances and it was not required that specific mitigating circumstances be singled out.

Petitioner now asserts before this Court that the trial court's charge was devoid of any effective guidelines concerning mitigation and that the jury could not have been expected to know what they could and could not consider. Petitioner asserts that this factor combined with the fact that aggravating circustances were written down for the jury, produces an unbalanced effect and violates due process.

Under the statutory scheme set forth in Georgia, which has been upheld by this Court in Gregg, supra, statutory aggravating circumstances are required to be submitted to the jury in writing. This is required because the jury must find the existence of at least one of these statutory aggravating circumstances beyond a reasonable doubt before the death penalty can be imposed. Mitigating circumstances are not required by any of the statutes to be submitted to the jury

for their consideration. The trial court is only charged with instructing the jury that they are to consider anything in mitigation.

In the instant case, the Court charged the jury during the sentencing phase, "You should consider all the evidence submitted to you in both phases of the trial of this case in arriving at your verdict as to the sentence to be imposes. This would include any evidence of mitigating circumstances received by you in this case." (T. 813). The Court went on to charge that the jury should consider any mitigating circumstances presented. The Court stated, "Mitigating circumstances are those circumstances which in fairness and mercy shall be considered by you in fixing the punishment. You may, if you see fit. . . provide for a life sentence for the accused based upon any mitigating circumstance or reason satisfactory to you, or without any reason, if you see fit to do so." (T. 813-814).

The Supreme Court of Georgia has considered this allegation on several occasions and found that mitigating circumstances are not required to be singled out under Georgia law, referring to Ga. Code Ann. § 26-3102. "Mitigating circumstances are not a predicate for a recommendation of a life sentence, though statutory aggravating circumstances are required for a death sentence." Thomas v. State, 240 Ga. 393, 401, 242 S.E.2d 1 (1977). In Spivey v. State, 241 Ga. 477, 479, 246 S.E.2d 288 (1978), the Supreme Court of Georgia held as follows:

> "The reason behind the ruling was that Georgia law no where defines mitigating circumstances. 'Mitigating circumstances' are referred to in Code Ann. § 26-2534.1(b) and § 26-2503, but the statutes are wholly silent on what they shall be. . . . The conclusion is inescapable that the legislature meant to empower the jury to consider as mitigating anything they found to be mitigating without limitation of definition. This is a constitutionally valid procedure."

In the instant case, the Court noted its previous decisions and found that there was no requirement that specific mitigating circumstances be singled out, nor was there any right to have written instructions sent to the jury concerning mitigating circumstances.

Respondent asserts that, contrary to Appellant's contention, this finding by the Supreme Court of Georgia does not present a violation of due process. The term mitigation is readily understood by the average person in the community. No further definition is required except to tell a juror that he may consider any evidence in mitigation. Clearly, any juror would realize that any factor that he considered mitigating would appropriately be considered by him in determining whether to impose a death penalty. Thus, there is no merit to this allegation by the Petitioner.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Garnett William Cape.

Respectfully submitted,

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